U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: JAN 9 1991

CASE NO: 89-INA-173

In the Matter of

REMINGTON PRODUCTS, INC.,
Employer

on behalf of

ANTONIO S. ALVAIRA,
Alien

Before: *Groner, Brenner, Glennon, Guill, Lipson, Litt, Silverman, and Williams*
Administrative Law Judges

DECISION AND ORDER

Introductory statement

This is an administrative-judicial review, requested under the Immigration and Nationality Act, 8 U. S. C. 1101 *et seq*., of the denial, by a Certifying Officer of the United States Department of Labor, of an application for labor certification for the permanent employment of an alien. The Act includes a special provision (Section 212(a)(14), 8 U. S. C. 1182(a)(14)), under which employers in this country may obtain admission to the United States of an alien worker to take a specific job, if the Secretary of Labor certifies (1) that there are not enough American workers at that time who are able, willing, qualified, and available for that job in the place where the work is to be done, and (2) that employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed. The Secretary has published regulations, in Part 656 of Title 20, Code of Federal Regulations, so that the requirements for such certification will be clearly understood.[1]

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[1] The following abbreviations are used in this Decision and Order:

The Act, for the Immigration and Nationality Act, 8 U. S. C. 1101 *et seq*.;
AF, for the Appeal File, assembled by the Certifying Officer, which, with the petitioner's request for review and supporting brief, constitutes the record upon which this review is based;
CO, for the Certifying Officer;
NOF, for the Certifying Officer's Notice of Findings, preliminary to a Final Determination; and

(continued...)

An employer seeking to take advantage of this special provision of the Act is required to comply strictly with those requirements, and of course bears the burden of proof to document that he has done so. Thus he must show that he has fairly and by reasonable means made a good faith effort to test the availability of qualified U. S. workers, and to recruit such workers who are willing to work at the prevailing wages and under the working conditions of the proposed job opportunity.

The Facts

On October 9, 1986 Remington Products, Inc., the Employer in this case, filed an application for alien labor certification for Alien Antonio Alvaira, to fill the position of Export Administrator. The duties of the job were to be as follows:

> Responsible for growth and expansion of markets in Southeast Asia and South America, and overseeing existing operations in those areas for compliance with export requirements. Duties include: Assisting in the planning of advertising programs, and reviewing and proofing layout and copy; working with vendors for sourcing; reporting costs of lost and damaged goods, freight charges and similar charges for use in P/L analysis; examining estimates of material, equipment and production costs, performance requirements, and delivery schedules to insure completeness and accuracy; reviewing documents; such as, invoices, bills of lading, and shipping statements; and reporting of duties, tariffs and other fees to the traffic department.

Requirements for the job were a knowledge of Spanish and Tagalog, familiarity with electrical equipment, and extensive travel. AF 56.

On April 28, 1987, Employer submitted its final documentation, and reported that three United States workers had responded to the job offer. One had declined the job. Another was rejected for lack of fluency in Tagalog and inability to provide references. The third was found to be qualified, but told Employer that he preferred to work as a consultant. AF 67, 63. This applicant was subsequently engaged under contract to Employer as an external consultant. Employer reported, however, that it still sought Mr. Alvaira's certification for the position of Export Administrator.

On March 28, 1988, the Certifying Officer issued a warning Notice of Findings, which proposed to deny certification on the basis that the requirement to know Spanish and Tagalog was restrictive and had not been justified as a business necessity. AF 45. Employer was required by the CO either to prove that in fact this ability was necessary, or to delete that language requirement and to conduct a new recruitment.

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[1](...continued)
FD, for the Certifying Officer's Final Determination, from which this appeal is taken.

Employer filed a rebuttal on June 1, 1988. It contended that the requirement was essential to performance of the job and did constitute a business necessity. In support of that position Employer submitted numerous internal and external documents, price lists, foreign language advertisements, and the like. AF 7, 44.

Nevertheless the CO, in her Final Determination issued August 24, 1988, found the rebuttal insufficient to establish a business necessity for the language requirements, so that those requirements were in violation of 20 C. F. R. sec. 656.21(b)(2)(i). Accordingly, she denied certification. Employer filed a timely appeal to this Board, and submitted a brief in support of its position. AF 3.

The Board Panel to which the appeal was assigned upheld the CO's denial of certification, on the basis that the latter's determination had been correct. For reasons stated below, however, it appeared to the Board that that decision required review to avoid a breach in the uniformity of Board decisions on the matter, and we therefore granted Employer's application for review *en banc*.

Analysis and Discussion

It is well settled that an employer, seeking the benefit of this special provision of the Immigration and Nationality Act, has the burden of proof on an appeal from a Certifying Officer's denial of certification. In attempting to carry that burden here, Employer contends that its Export Administrator will be charged with expanding Remington's business in Southeast Asia and South America. It expects market penetration beyond the larger cities, into areas where it says that only the native language is spoken. Employer estimates, in fact, that about 40% of the people to be contacted will not speak English. Advertisements will be in the native language.

Employer states that the only applicant it found to be qualified declined full-time employment in the advertised position, but that, after some negotiation, he was engaged as a consultant. Employer reports that he has traveled to the Philippines, on its behalf, to begin market development in that region. Nevertheless, Employer considers the job offer as being thus far unfilled, and that filling it remains necessary to its business.

Employer submitted to the CO four pages of copies of advertisements in foreign newspapers (two in Spanish and two in Tagalog) (AF 37, 40), a note from the consultant advising that most advertising is now in English (AF 39), a magazine article relating to factory establishment and operation in Mexico and labor relations there, two documents in Spanish regarding orders and shipment to South America (AF 18, 22), and correspondence, in English, from Employer to its agents in the Philippines, Venezuela, and Chile (AF 15, 19, 21, 24-33, 36).

The CO seems to have interpreted Section 656.21(b)(2)(i) of Title 20 as restricting the concept of business necessity to only those cases where the employer would suffer loss to its existing business if the specific qualification were not required, and not to a situation in which its goal is to expand its business in foreign markets, and as authorizing certification only where a language requirement is normally required for the job opportunity in the United States.

We think that this is too narrow a view, and that it departs from the customary application of that regulation, which, after all, prefaces the provision relied on by the CO with the words ". . . unless adequately documented as arising from business necessity." The Act was not designed to prevent American employers from expanding their business to foreign markets. Nor do we know of any legal requirement that the need for a foreign language exist within the United States. This job opportunity is here, but it is for the firm's Export Administrator. The question is whether or not the person hired for the job, who is going to travel and operate overseas in the performance of his duties, needs the specific foreign language capability in order to do so. Moreover, as we have noted, the rule that a requirement is unduly restrictive if it is not normally required for the job in this country does not apply if the requirement can be justified in the specific case as a business necessity.

With its request for review Employer submitted certain evidence, which ordinarily we would not consider on the ground that it had not been part of the record before the CO. One of the items, however, Employer tells us actually was in the file below, but was not included among the documents forwarded to us in the Appeal File. This was a letter from one of its affiliated distributors, in Manila, stating that the languages spoken in the Philippine areas targeted as markets are Filipino or Tagalog, and that in their opinion, to effectively penetrate those markets advertising and other materials must be printed in that language. The other relevant item is a clarification, that the applicant whom they did hire as a consultant did in fact speak Tagalog, although that fact did not appear in his resume. This fact is of interest, but does not seem to us to require a remand of the case to the Certifying Officer, inasmuch as his qualifications were not challenged at any time during the course of this proceeding.

We recognize that most of the material furnished to us for consideration in this case was in the English language, but we do not see that fact as logically indicating that consumer products can be advertised and sold to and through distributors in the Philippines and in South America without some recourse to the language of the customers' countries. In our judgment Employer has made out its case, and meets the standard set in *In re Information Industries*, 88-INA-82 (Feb. 9, 1989), to show that the language requirement here does bear a reasonable relationship to the duties of the position offered, in the context of Employer's business, and that that qualification is necessary to perform in a reasonable manner the occupation as described by Employer. Cf. *Tel-Ko Electronics, Inc.*, 88-INA-416 (July 30, 1990) (reconsideration *en banc*). It follows that the Certifying Officer's denial was in error, and that certification should be granted.

ORDER

For the reasons stated, it is ORDERED, That the Certifying Officer GRANT the certification sought in this case.

For the Board:

Samuel B. Groner
Administrative Law Judge

Washington, D. C.

SBG:gbs